

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

ANDREY LARSHIN,

No. 2:21-cv-0122 TLN KJN P

Petitioner,

v.

FINDINGS AND RECOMMENDATIONS

B. KIBLER,

Respondent.

Petitioner, a state prisoner, proceeds pro se with an application for writ of habeas corpus pursuant to 28 U.S.C. § 2254. On December 1, 2021, petitioner filed a second amended petition. Respondent filed a motion to dismiss this action alleging the petition is untimely, includes unexhausted claims, and includes noncognizable federal claims. As discussed below, respondent's motion should be partially granted.

I. Background

On January 13, 2021, petitioner filed the instant action. Petitioner filed an amended petition on February 19, 2021. Respondent moved to dismiss.

On October 12, 2021, the court granted petitioner thirty days leave to file a motion to amend, accompanied by a second amended petition, as well as a motion for stay or request to abandon unexhausted claim three. Petitioner was informed of his options for seeking stays if he

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1 intended to pursue his state court remedies for any unexhausted claim, and cautioned that failure
2 to file such motion would result in the claim being dismissed as unexhausted. (ECF No. 23.)

3 Petitioner did not file a motion for stay, but rather filed a motion to amend and a second
4 amended petition. The motion to amend was granted, and petitioner's second amended petition
5 was filed on December 1, 2021. Petitioner raised four claims: excessive sentencing; ineffective
6 assistance of counsel; the trial court exceeded its jurisdiction; and violation of due process by
7 denying petitioner a hearing. (ECF No. 26.)

8 On January 20, 2022, respondent filed a motion to dismiss, arguing that the petition is
9 barred by the statute of limitations, that claims three and four are unexhausted because petitioner
10 did not present them to the California Supreme Court, but in the alternative claims one, three and
11 four are not cognizable. (ECF No. 28.) Petitioner did not file an opposition. On February 25,
12 2022, petitioner was ordered to show cause why his failure to oppose the motion should not be
13 deemed a waiver of any opposition to the granting of the motion and directed to file an
14 opposition. Petitioner was cautioned that failure to respond to the order to show cause, or to
15 oppose the motion to dismiss, would result in a recommendation that this action be dismissed.

16 On April 1, 2022, petitioner filed a response to the order to show cause. Petitioner did not
17 file an opposition to the motion to dismiss, but rather stated that he "refuse[s] to have [his] case
18 dismissed," and "stand[s] on the truth of [his] writ of habeas corpus and have the judge hear [the]
19 case." (ECF No. 31 at 1.)

20 II. Motion to Dismiss

21 Rule 4 of the Rules Governing Section 2254 Cases allows a district court to dismiss a
22 petition if it "plainly appears from the face of the petition and any exhibits annexed to it that the
23 petitioner is not entitled to relief in the district court. . ." Id. The Court of Appeals for the Ninth
24 Circuit has referred to a respondent's motion to dismiss as a request for the court to dismiss under
25 Rule 4 of the Rules Governing § 2254 Cases. See, e.g., O'Bremski v. Maass, 915 F.2d 418, 420
26 (1991). Accordingly, the court reviews respondent's motion to dismiss pursuant to its authority
27 under Rule 4.

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1 III. Statute of Limitations

2 A. Legal Standards

3 The Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), which became
4 law on April 24, 1996, imposed for the first time a statute of limitations on petitions for a writ of
5 habeas corpus filed by state prisoners. This statute of limitations provides that:

6 A 1-year period of limitation shall apply to an application for a writ
7 of habeas corpus by a person in custody, pursuant to the judgment of
a State court. The limitation period shall run from the latest of –

8 (A) the date on which the judgment became final by the conclusion
9 of direct review or the expiration of the time for seeking such review;

10 (B) the date on which the impediment to filing an application created
11 by State action in violation of the Constitution or laws of the United
States is removed, if the applicant was prevented from filing by such
State action;

12 (C) the date on which the constitutional right asserted was initially
13 recognized by the Supreme Court, if the right has been newly
recognized by the Supreme Court and made retroactively applicable
to cases on collateral review; or

14 (D) the date on which the factual predicate of the claim or claims
15 presented could have been discovered through the exercise of due
diligence.

17 28 U.S.C. § 2244 (d)(1).

18 B. Chronology¹

19 1. Petitioner was convicted in 2005 of numerous offenses, including assault with a
20 firearm, robbery, and extortion by threat. (ECF No. 16-1 (Respondent’s Lodged Document
21 (“LD”) 1.) The jury found true personal firearm use enhancements. (*Id.*) On October 28, 2005,
22 petitioner was sentenced to a determinate state prison term of 29 years, four months. (*Id.*; ECF
23 No. 26 at 1.)

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26 ¹ Under the mailbox rule, a pro se prisoner’s habeas petition or other pleading is filed “at the time
27 . . . [it is] delivered . . . to the prison authorities for forwarding to the court clerk.” Hernandez v.
Spearman, 764 F.3d 1071, 1074 (9th Cir. 2014) (alteration in original) (internal quotation marks
28 omitted) (quoting Houston v. Lack, 487 U.S. 266, 276 (1988)). Petitioner is afforded the benefit
of the mailbox rule for each petition identified herein.

1 2. Petitioner filed an appeal. On December 29, 2006, the California Court of Appeal for
2 the Third Appellate District affirmed the judgment. (ECF No. 29-2 (LD 2).)

3 3. Petitioner sought review in the California Supreme Court. (ECF No. 29-3 (LD 3).) On
4 March 14, 2007, the petition for review was granted. (ECF No. 29-4 (LD 4).)

5 4. On August 27, 2008, the case was transferred to the state court of appeal with
6 directions to vacate its decision and reconsider the case in light of People v. Towne, 44 Cal.4th 63
7 (2008). On November 5, 2008, the state court of appeal affirmed the judgment without
8 modification. (ECF No. 29-5 (LD 5).)

9 5. Petitioner sought review in the California Supreme Court, which was denied on
10 January 14, 2009. (ECF Nos. 29-6, 29-7 (LD 6-7).)

11 6. On April 26, 2010, petitioner filed his first petition for writ of habeas corpus in the
12 Sacramento County Superior Court. (ECF No. 29-8 (LD 8).) The first petition was denied on
13 May 28, 2010. (ECF No. 29-9 (LD 9).)

14 7. On June 18, 2010, petitioner filed a petition for writ of habeas corpus in the California
15 Court of Appeal, Third Appellate District. (ECF No. 29-10 (LD 10).) The state appellate court
16 denied the petition on July 1, 2010. (ECF No. 29-11 (LD 11).)

17 8. On April 8, 2010, petitioner filed a federal petition challenging his 2005 conviction.
18 Larshin v. Corcoran State Prison, No. 2:10-cv-0835 FCD GGH (E.D. Cal.) (ECF No. 29-17 (LD
19 17).) Petitioner challenged the imposition of the upper term sentences for assault with a firearm
20 and the attached firearm enhancement as a violation of his right to a jury trial as guaranteed by
21 the Sixth and Fourteenth Amendments to the Constitution. (ECF No. 29-17 (LD 17).) The
22 petition was denied on June 24, 2011. (ECF No. 29-20 (LD 20).)

23 9. On November 17, 2019, petitioner filed a petition for re-sentencing under California
24 Senate Bill 620 (“SB 620”)² in the Sacramento County Superior Court. (ECF No. 29-12 (LD
25 12).) On December 12, 2019, the re-sentencing petition was denied.³ (ECF No. 29-13 (LD 13).)

26 ² Senate Bill 620, effective January 1, 2018, granted trial courts the discretion to strike firearm
27 enhancements. See People v. Hurlic, 25 Cal. App. 5th 50, 54, 235 Cal. Rptr.3d 255 (2018).

28 ³ Petitioner filed an appeal of the superior court’s denial of the re-sentencing petition, but the

1 10. On April 11, 2019, petitioner filed a petition for writ of habeas corpus in the
2 California Supreme Court. (ECF No. 29-15 (LD 15).) The petition was pending at the time
3 respondent filed the first motion to dismiss. (ECF No. 29-16 (LD 16).) The California Supreme
4 Court denied the petition on June 30, 2021.⁴

5 11. On October 9, 2020, petitioner's judgment was corrected to include five more days of
6 presentence custody credits, and entered *nunc pro tunc* to October 28, 2005, petitioner's original
7 sentencing date. (ECF No. 29-1 at 1-2 (LD 1).)

8 12. On January 13, 2021, petitioner constructively filed the instant federal petition. See
9 Rule 3(d) of the Federal Rules Governing Section 2254 Cases.

10 C. Calculation of Limitations Period

11 As noted by respondent, the abstract of judgment was amended on October 9, 2020, to
12 grant petitioner additional credits for time served. (ECF No. 29-1.) Respondent states, without
13 citing legal authority, that the award of custody credits did not restart the limitations clock
14 because it was granted *nunc pro tunc* to the original sentence date. (ECF No. 28 at 4 n.3.)

15 However, the Ninth Circuit has addressed this issue:

16 a state trial court's alteration of the number of presentence credits to
17 which a prisoner is entitled is a legally significant act: it replaces an
18 invalid sentence with a valid one. In determining whether, after
19 amending the number of credits, there has been a new judgment
20 "pursuant to" which a prisoner is "in custody" under Magwood [v.
Patterson], 561 U.S. [320,] 332, 130 S. Ct. 2788 [2010] (quoting 28
U.S.C. § 2254(b)(1)), the answer under California law is yes: before
21 the amendment, the prisoner was not held in custody pursuant to a
lawful judgment of the state courts and was being held for a greater
number of days than was proper under California law. After the
amendment, however, there is a valid judgment pursuant to which

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state appellate court dismissed the appeal because the order was not appealable. (ECF No. 16-17
(LD 14).)

24 ⁴ The court may take judicial notice of facts that are "not subject to reasonable dispute
25 because it . . . can be accurately and readily determined from sources whose accuracy cannot
26 reasonably be questioned," Fed. R. Evid. 201(b), including undisputed information posted on
official websites. Daniels-Hall v. National Education Association, 629 F.3d 992, 999 (9th Cir.
2010). It is appropriate to take judicial notice of the docket sheet of a California court. White v.
Martel, 601 F.3d 882, 885 (9th Cir. 2010). The address of the official website of the California
state courts is www.courts.ca.gov.

1 the prisoner is lawfully being held in custody and he is being held for
2 a lesser (and the correct) number of days.

3 Gonzalez v. Sherman, 873 F.3d 763, 769-70 (9th Cir. 2017). In other words, “changing
4 presentence credits resulted in a new judgment under California law because application of
5 custody credits determined ‘the total duration of time which a convicted person will have to spend
6 in prison’ and a sentence is legally valid only if it awards all the credits to which the person is
7 entitled.” Brian Means, Federal Habeas Manual § 11:47, quoting Gonzalez, 873 F.3d at 769.
8 Although the superior court had not labeled its order *nunc pro tunc*, the Ninth Circuit stated that
9 the state court could not amend the presentence credits as a *nunc pro tunc* order because “the
10 function of a *nunc pro tunc* order is merely to correct the record of the judgment and not to alter
11 the judgment actually *rendered*.” Id. at 773. Rather, “*nunc pro tunc* orders can be used only to
12 correct errors of the scrivener’s sort -- ‘recording errors.’” Id. The Ninth Circuit found that
13 applying credits for time served was not a scrivener’s error and therefore required an amended
14 judgment under California law.⁵ Id.

15 The statute of limitations clock begins anew when a state court judgment is amended. Id.;
16 Shropshire v. Baca, 702 F. App’x 629, 630 (9th Cir. 2017) (“In Gonzalez, we held that the
17 AEDPA’s statute of limitations clock restarts when a state-court judgment is amended.”)

18 In the instant case, on October 9, 2020, petitioner’s judgment was corrected to include five
19 more days of presentence custody credits. (ECF No. 29-1 at 1-2 (LD 1).) It is unclear whether
20 petitioner appealed the modified judgment. However, he filed the instant petition on January 13,
21 2021, 96 days after the modified judgment was entered. Because petitioner filed this action
22 within a year of the modified judgment, the undersigned cannot find that this action is barred by
23 the statute of limitations. Respondent’s motion to dismiss on statute of limitations grounds
24 should be denied.

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26 ⁵ But see People v. Humphrey, 44 Cal. App. 5th 371, 379-380 (2020). In Humphrey, a California
27 appellate court held that a miscalculation of custody credits is a clerical error, and does not
28 operate to give a defendant retroactive application of the new enhancement provisions. Id.
 However, this court is bound by Ninth Circuit law.

1 Because the petition is timely, the court need not address the impact of California SB 620,
2 if any, on the statute of limitations analysis.

3 IV. Unexhausted Claims

4 As set forth above, petitioner raises four claims in his second amended petition:
5 (1) excessive sentencing; (2) ineffective assistance of counsel; (3) the trial court exceeded its
6 jurisdiction; and (4) violation of due process by denying petitioner a hearing. (ECF No. 26.)
7 However, petitioner only raised two claims in the California Supreme Court: ineffective
8 assistance of counsel; and excessive sentence in violation of Cunningham v. California, 549 U.S.
9 270 (2007), and Apprendi v. New Jersey, 530 U.S. 466 (2000). (ECF No. 29-15 (LD 15).)

10 After reviewing the state court documents lodged by respondent, the court concludes that
11 claims three and four are unexhausted because petitioner did not present them to the California
12 Supreme Court. Although petitioner was provided the legal standards governing a stay and
13 abeyance, and provided an opportunity to file a motion for stay, petitioner did not file such a
14 motion. However, a petition also may be denied on the merits without exhaustion of state court
15 remedies. 28 U.S.C. § 2254(b)(2).

16 V. Claims Not Cognizable?

17 In the alternative, respondent argues that claims one, three and four are not cognizable.
18 Petitioner did not address this issue.

19 The undersigned is persuaded that petitioner's claims based on California SB 620 are not
20 cognizable. "In asserting a right to resentencing under California's Senate Bill 620, petitioner
21 raises a state-law claim that is not reviewable in federal court." Moreno v. Pollard, 2021 WL
22 864066, *6 (C.D. Cal.), report and recommendation adopted by, 2021 WL 863750 (C.D. Cal.
23 2021); see also Godfrey v. Warden PVSP, 2020 WL 3544980, *2 (N.D. Cal. 2020) (A "state
24 court's alleged misapplication of Senate Bill 620 does not present a federal habeas claim.");
25 Hearod v. Davis, 2019 WL 7562682, *6 (C.D. Cal. 2019) ("[E]very federal court to have
26 addressed the issue has held that claims for resentencing under Senate Bill No. 620 are not
27 cognizable."), report and recommendation adopted by, 2020 WL 127549 (C.D. Cal. 2020).
28 Petitioner's vague references to the Sixth and Fourteenth Amendments or due process and equal

protection (ECF No. 26 at 10, 19) do not change the analysis. Petitioner may not transform a state law claim into a federal one by merely asserting a violation of due process. See Langford v. Day, 110 F.3d 1380, 1389 (9th Cir. 1996). Thus, all of petitioner's sentencing claims based on California SB 620 in claims one, three and four are dismissed.

That said, petitioner's claim one, which is exhausted, also alleged that he was sentenced in violation of Apprendi v. New Jersey, 530 U.S. 466 (2000). (ECF No. 26 at 5.) The Apprendi line of cases generally forbid state sentencing courts from imposing a prison term greater than the "statutory maximum" based solely on judicial fact-finding, see Cunningham, 549 U.S. at 281-82 (citations omitted). Respondent failed to address either Apprendi or Cunningham in the motion to dismiss. Therefore, respondent's motion to dismiss claim one, with the exception of that portion related to SB 620, is denied without prejudice.

VI. Conclusion

In light of these findings, respondent should be directed to answer that portion of claim one in which petitioner claims his sentence violates Apprendi or Cunningham, as well as petitioner's second claim alleging ineffective assistance of counsel.

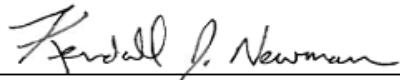
Accordingly, IT IS HEREBY RECOMMENDED that respondent's motion to dismiss (ECF No. 28) is granted in part and denied in part, as follows:

- 18 1. The motion to dismiss on statute of limitations grounds be denied;
- 19 2. Claims three and four (ECF No. 26) be dismissed, and that portion of claim one based
20 on California Senate Bill 620 be dismissed; and
- 21 3. Within thirty days from any district court order addressing these findings and
22 recommendations, respondent shall file an answer to claims one (as narrowed) and two.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within **thirty** days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Any response to the objections shall be served and filed within fourteen days after service of the objections. The parties are advised that

1 failure to file objections within the specified time may waive the right to appeal the District
2 Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

3 Dated: May 10, 2022

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5 KENDALL J. NEWMAN
6 UNITED STATES MAGISTRATE JUDGE

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